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1. IT ALL STARTED WITH 504.

1.1 WHAT IS IT? Section 504 refers to that portion of the federal *Vocational Rehabilitation Act* of 1973 (29 USC Sec. 705, et seq.) which prohibits discrimination by federal grant/fund recipients against those with "handicaps" from participating in their programs. It is not a separate statutory right (such as the right to be free from employment discrimination. Compliance with IDEA means compliance with 504, but not the reverse. The exact, simple and concise wording of Section 504 is as follows:

No otherwise qualified individual with a disability in the United States, as defined [by the Act], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance...

1.2 DEFINITION OF HANDICAP. The term "handicap" means any person "who (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such impairment; or (iii) is regarded as having such impairment." There is no separate "listing" or classifications of handicaps such as there are classifications of disabilities in IDEA. The term "major life activities" includes functions such as taking care of one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." Examples of "handicaps": HIV/AIDS, tuberculosis, arthritis, asthma, allergies, diabetes, ADD/ADHD, temporary disabilities, cancer, etc. etc.

1.3 MORE NARROW THAN IDEA. IDEA creates mandatory affirmative obligations on school districts to provide that which is needed by a child with disabilities to obtain a free and appropriate education. However, 504 is framed in the negative: it forbids discrimination or exclusion from educational programs. Simply put, 504 does not create any additional rights to education, but only prohibits federally funded districts from denying a student from participation in any educational program/activity simply due to handicaps.

1.4 PARENTS, NOT JUST STUDENTS! Applies to general public, including parents! Thus, even without the Americans with Disability Act, the District must not discriminate with respect to its facilities or programs; e.g. wheelchair bound parent must have access to school for conferences and other programs to which parents and/or the public are invited (plays, concerts, awards programs, etc.).

1.5 504 OFFICER AND TEAM. Must have a meeting to determine if the child has a qualifying disability and, if so, what accommodations can be made/offered.

1.6 CASE STUDY: *Grube v. Bethlehem S.D.*, 550 F.Supp. 418 (D.C. Pa., 1982).

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1.6.1 Facts?

1.6.2 Legal claims and relief sought?

1.6.3 Outcome?

1.6.4 Why?

1.6.5 Equal protection??

1.7 CASE STUDY: *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376 (C.D. Ca., 1987). (same questions)

1.8 ACCOMMODATIONS. (see attached CDE list).

2. IDEA mandates that "...all children with disabilities have available to them a free appropriate education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d).

2.1 THE ROWLEY EXPLANATION OF IDEA. "First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more." *Bd. of Ed. of Hendrick Hudson S.D. v. Rowley*, 458 U.S. 176 at 206 (1982).
Translation: did you follow the procedures and come up with a good IEP? If so, you're golden because IDEA does not guarantee outcomes or substantive rights to a particular education (a Chevy not a Cadillac).

2.2 IT ALL STARTS (AND ENDS) WITH "FAPE." IDEA requires all districts to provide special ed students a free, appropriate education (FAPE). What is FAPE?

2.2.1 The child's program set forth in the IEP is individualized on the basis of assessment and performance;

2.2.2 The program is administered in the least restrictive environment;

2.2.3 The services (regular ed and special services) are provided in a coordinated, collaborative manner; and

2.2.4 The IEP must be reasonably calculated to provide academic and non-academic benefits or progress (and if monitoring shows no benefits/progress, then must amend IEP—"keep trying").

2.3 THE ADEQUACY OF THE IEP: *O'Toole v. Olathe Unified S.D.*, 144 F.3d 692 (10th Cir. 1998). When judging an IEP, the courts view five factors:

2.3.1 Was it developed in accordance with IDEA's procedures?



2.3.2 Is it reasonably calculated to enable the student to receive educational benefits?

2.3.3 Technical deviations from procedures do not render the IEP entirely invalid because form is not exalted over substance.

2.3.4 "The measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date" to avoid "Monday morning quarterbacking."

2.3.5 Nevertheless, the implementation of the written IEP is "ongoing, dynamic activity" and must be evaluated as such; thus "a school district can not ignore the fact that an IEP is clearly failing nor can it continue to implement, without change, an IEP which fails to confer educational benefits on the student." Question: how much benefit is sufficient?

2.4 LEAST RESTRICTIVE ENVIRONMENT: *L.B. v. Nebo S.D.*, 379 F.3d 966 (10th Cir. 2004).

2.4.1 The LRE continuum:

- a. Regular classroom ("mainstreaming") with supports.
- b. Special classes for educational services, returning to regular classroom for remainder of educational services.
- c. Self contained spec ed classroom.
- d. Special programs on or off campus (e.g., "day treatment")
- e. Out of district placements (may or may not be residential)

2.4.2 "...Director of Special Education shall . . . place the child. . . in the least restrictive environment consistent with the placement decision of the IEP team, including the parents and other persons who are knowledgeable about the child, the meaning of the evaluations and the placement options." (§5.04 CDE Regs)

2.4.3 A change in class location or program location or transfer from one school to another within the same district are administrative decisions and may not constitute a change in placement (case by case basis). But when a program is materially altered, such as a change in the amount or type of services, and not simply a change in location, the change must be decided by the the IEP team.

2.4.4 The *Nebo Rules*: LRE is a statutory mandate, not just a question of methodology! To implement the mandate:



- a. Determine whether education in a regular classroom can be achieved satisfactorily, with use of supplemental services/aids. In making that decision, consider:
 - i. steps the district has taken to accommodate child in regular ed;
 - ii. comparison of the benefits of each alternative placement;
 - iii. child's overall experience in reg ed, including non-academic benefits; and
 - iv. the effect on the regular classroom of the child's presence in that classroom.
- b. If can not, then determine if the district has mainstreamed to the maximum extent possible.

2.5 THE PROBLEM OF RELATED SERVICES.

2.5.1 Definition. "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. Exception. The term does not include a medical device that is surgically implanted, or the replacement of such device.

2.6 PARENTAL PLACEMENTS AND DISTRICT FINANCIAL RESPONSIBILITY. Under IDEA, there are only three instances under which a district would be financially responsible for the costs of a private placement by the parents:

2.6.1 When the district REFERS the student to that facility; or

2.6.2 The district CONSENTS to the private placement; or

2.6.3 If the district fails to provide FAPE, thus necessitating the parents' private placement into an "appropriate" placement.

COMPARISON

Issues	Section 504	Individuals With Disabilities Education Act	Americans with Disabilities Act
TYPE	A Civil Rights Law	An Education Act	A Civil Rights Law
TITLE	The Rehabilitation Act of 1973, as amended.	The Individuals With Disabilities Education Act (IDEA) Amendments of 1997	Americans With Disabilities Act of 1990 (ADA), as amended.
PURPOSE	Is a civil rights law that protects the rights of individuals with disabilities in programs and activities that receive federal financial assistance.	Is a federal funding statute whose purpose is to provide financial aid to states in their efforts to ensure a free appropriate public education for children with disabilities.	Provides a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.
RESPONSIBILITY	General education, but shared with special education.	Special education, but shared with general education.	Public and private schools, business establishments and public buildings. (services)
FUNDING	State and local responsibility. (no federal funding)	State, local, and federal. IDEA funds cannot be used to serve children eligible only under Section 504.	Public and private responsibility. (no state or federal funding)
ADMINISTRATOR	Section 504 coordinator (systems with 15 plus employees) to coordinate efforts to comply with this law.	Special education director.	ADA Coordinator is required to coordinate efforts to comply with this law.
SERVICE TOOL	Accommodations and/or services.	Individualized Education Program (IEP). Some IEPs may include Section 504 accommodations necessary for success in the general classroom.	Reasonable accommodations and legal employment practices.

Issues	SECTION 504	INDIVIDUALS WITH DISABILITIES EDUCATION ACT	AMERICANS WITH DISABILITIES ACT
POPULATION	Identifies person as disabled so long as she/he meets the definition of qualified persons with disabilities; i.e., has or has had a physical or mental impairment which substantially limits a major life activity, or is regarded as disabled by others.	Identifies 13 qualifying conditions: autism, deafness, deaf-blindness, hearing impairment, mental retardation, multiple disabilities, orthopedic impairment, other health impairment, emotional disturbance, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment.	Identifies person as disabled so long as she/he meets the definition of a qualified person with disabilities, i.e., has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as disabled by others.
ELIGIBILITY	A person is eligible so long as she/he meets the definition of a qualified person with disabilities, i.e., currently has or has had a physical or mental impairment that substantially limits a major life activity, or is regarded as disabled by others. The child is not required to need special education services to be protected.	A child is eligible to receive special education and related services if the multidisciplinary team determines that the child has a disability under one of the thirteen qualifying conditions and requires special education services.	A person is eligible so long as she/he meets the definition of a qualified person with disabilities, i.e., currently has or has had a physical or mental impairment which substantially limits a major life activity, or is regarded by others as having a disability. The child is not required to need special education services in order to be protected.
FREE APPROPRIATE PUBLIC EDUCATION	A child could receive special education services and/or related services and/or accommodations.	A child must first be eligible and need special education before they are entitled to a related service. The related service must benefit the children special education program.	Addresses education in terms of accessibility requirements. Requires private and public entities not to use employment practices that discriminate on the basis of a disability.

Issues	SECTION 504	INDIVIDUALS WITH DISABILITIES EDUCATION ACT	AMERICANS WITH DISABILITIES ACT
ACCESSIBILITY	Federal regulations regarding building and program accessibility requires that reasonable accommodations be made.	Requires that modifications must be made if necessary to provide access to a free appropriate public education.	Requires that public programs be accessible to individuals with disabilities.
DRUG AND ALCOHOL USE	Current drug use is not considered a disability. An individual who has stopped using drugs and/or alcohol and is undergoing rehabilitation could be eligible for accommodations.	Drug and alcohol use is not covered under special education.	Current drug use is not considered a disability. Current alcohol abuse that prevents individuals from performing duties of the job or that constitutes a direct threat to property or safety of others is not considered a disability.
CONTAGIOUS DISEASES	Individual with disabilities excludes any individual with a contagious disease that renders the individual unable to perform their job.	Could be eligible under the category of "other health impaired."	Permits qualification standard requiring that an individual with a currently contagious disease or infection not pose a direct threat to the health or safety of others.
PROCEDURAL SAFEGUARDS	Both require notice to the parent or guardian with respect to identification, evaluation, and placement.		
			Makes provisions for public notice, hearings, and awarding attorney fees.

Issues	Section 504	Individuals With Disabilities Education Act	Americans with Disabilities Act
PROCEDURAL SAFEGUARDS CONT.		Notice provisions are much more comprehensive. Minimum requirements of the notice are specified.	Self-evaluations and transition plans are required and updated annually.
NOTICE AND CONSENT	Notice is required before a "significant change in placement." Written consent would be considered a best practice.	Parental consent is generally required before taking action in regards to the child's special education program.	
EVALUATIONS	Evaluation draws on information from a variety of sources in the area of concern. Decisions are made by a group knowledgeable about the child evaluation data, and placement options. Requires written parental notice. Written parental consent is considered a best practice. Requires periodic reevaluations. Reevaluation is required before a significant change in placement.	A full comprehensive evaluation is required assessing all areas related to the suspected disability. The child is evaluated by a multidisciplinary team. Parental consent is required before the initial evaluation can be conducted. Consider a reevaluation every 3 years if determined appropriate by the team. Parental consent is required before the re-evaluation is conducted. A reevaluation is required before a significant change in placement.	All schools should conduct or update their Section 504 self-evaluation regarding services, accessibility, practices, and policies to assure discrimination is not occurring with any individual with disabilities.

ISSUES	SECTION 504	INDIVIDUALS WITH DISABILITIES EDUCATION ACT	AMERICANS WITH DISABILITIES ACT
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EVALUATIONS CONT.	No provision is made for independent evaluations at district expense. The school district should consider other evaluations and information regarding the child.	Provides for independent educational evaluation. A due process hearing is available if the school and parent disagree on the need for an independent evaluation.	
SERVICES	When interpreting evaluation data and making service decisions, require districts to: <ul style="list-style-type: none"> * Draw upon information from a variety of sources. * Assure that all information is documented and considered. * The service decision is made by a group of persons including those who are knowledgeable about the child, disability, the meaning of the evaluation data and placement options. * Ensure that the child is educated with his/her nondisabled peers to the maximum extent appropriate. (Least Restrictive Environment — LRE). * Provide notice and conduct an evaluation before any change of services. 	both laws	
REVIEW OF PROGRAM	Accommodations should be reviewed periodically.	An IEP review meeting is required at least annually, or before any significant change.	
GRIEVANCE PROCEDURES	Requires districts to provide a grievance procedure for parents, children, and employees.	The parent can file a complaint with the state or request a due process hearing.	Any school district shall adopt and publish grievance procedures for resolution of ADA complaints.
COMPLAINT PROCEDURES	An individual or organization may file a complaint with the Office for Civil Rights. An OCR complaint must be filed, in writing, within 180 days after the violation has occurred. In certain cases OCR will consider complaints where more than 180 days have elapsed.	A complaint process through the state is required. Parents can file a complaint with the state, a decision must be provided within 60 days.	An individual or organization may file a complaint with the Office for Civil Rights. An OCR complaint must be filed, in writing, within 180 days after the violation has occurred. In certain cases OCR will consider complaints where more than 180 days have elapsed.

Issues	Section 504	Individuals With Disabilities Education Act	Americans with Disabilities Act
DUE PROCESS	Both statutes require districts to provide impartial hearings for parents or guardians who disagree with the identification, evaluation, or placement of child with disabilities. School districts or parents can initiate due process hearings. Requires that the parent have an opportunity to participate and be represented by counsel. Other details are left to the discretion of the local school district. Policy statements should clarify specific details. Delineates specific requirements.		Due process hearings can be initiated by either party. The court may allow a reasonable attorney's fee for the prevailing party.
MEDIATION	Not required, however mediation should always be suggested.	Mediation is optional for the parents, and should always be suggested.	Not required, however mediation should always be suggested.
EXHAUSTION	Administrative hearing is not required prior to OCR involvement or court action.	The parent or guardian should exhaust all administrative hearings before seeking court action.	An administrative hearing is not required prior to OCR involvement or court action.
ENFORCEMENT	Enforced by the U.S. Office for Civil Rights. Regional offices are located throughout the United States. The office is part of the U.S. Department of Education. The regional office is located at the Federal Building, Suite 310, 08-7010, 1244 Speer Boulevard, Denver, CO 80204-3582, (303) 844-5695; TDD (303) 844-3411.	Enforced by the U.S. Office of Special Education Programs. Compliance is monitored by the State Board of Education and the Office of Special Education Programs. The Colorado Department of Education will resolve complaints under Individuals with Disabilities Education Act.	Enforced by the U.S. Office for Civil Rights under an agreement with EEOC.

Issues	Section 504	Individuals With Disabilities Education Act	Americans with Disabilities Act
DISCIPLINE OF CHILDREN WITH DISABILITIES	<p>Requires that a school district evaluate all children with disabilities before making an initial placement or any subsequent, significant change in his or her placement. The proposed exclusion of a child with disabilities that is permanent (expulsion), for an indefinite period, or for more than 10 consecutive school days, constitutes a "significant change in placement."</p> <p>Before implementing a suspension or expulsion that constitutes a significant change in the child's placement, the school must conduct a reevaluation to determine if the behavior was caused by the disability.</p> <p>If there is no relationship between the disability and the behavior, the school can expel the child. The school is not required to provide services and/or accommodations during the expulsion period.</p>	<p>Before implementing a change in the child's placement, the school must conduct a manifestation determination to determine if the behavior was caused by the disability.</p> <p>If there is no relationship between the disability and the behavior, the school can expel the child but still needs to provide a free appropriate public education. This means the special education services outlined in the IEP. If there is a relationship, no disciplinary action can be taken. However, a change in services and placement can be proposed.</p>	

POSSIBLE ACCOMMODATIONS FOR ELIGIBLE CHILDREN

Accommodations can cover a wide range of environments and issues. The following pages can assist Section 504 teams in selecting appropriate accommodations for children who are eligible for Section 504 services.

ENVIRONMENTAL STRATEGIES

- Provide a structured learning environment.
- Adjust class schedules.
- Provide classroom aides and note takers.
- Modify nonacademic times such as lunch room and recess.
- Modify physical education.
- Change child seating.
- Provide use of a study carrel.
- Alter location of personal or classroom supplies for easier access or to minimize distraction.

ORGANIZATIONAL STRATEGIES

- Modify test delivery.
- Use tape recorders, computer-aided instruction, and other audiovisual equipment.
- Select modified textbooks or workbooks.
- Tailor homework assignments.
- Use of one-to-one tutorials.
- Provide peer tutoring.
- Set time expectations for assignments.

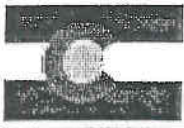
- c. large groups
 - d. use audio visuals (i.e., filmstrips, study prints)
 - e. peer tutors or cross-age tutors (i.e., take notes, monitor assignments, read aloud, listen)
 - f. demonstrations
 - g. experiments
 - h. simulations
 - i. games
 - j. 1-to-1 instruction with other adult
- Provide for oral testing.
 - Ask child to repeat directions/assignments to insure understanding.
 - Arrange for a mentor to work with child in his or her interest area or area of greatest strength.

METHODOLOGY STRATEGIES

- Repeat and simplify instructions about in-class and homework assignments.
- Supplement oral instructions with visual instructions.
- Change instructional pace.
- Change instructional methods.

CURRICULUM STRATEGIES

- Change instructional materials.
- Utilize supplementary materials.
- Assess whether child has the necessary prerequisite skills. Determine whether materials are appropriate to the child's current interest and functioning levels.
- Implement study skill strategies (survey, read, recite, review). Introduce definition of new terms/vocabulary and review to check for understanding.
- Limit amount of material presented on a single page.
- Provide a sample or practice test.
- Be aware of child's preferred learning style and provide appropriate instruction/materials.



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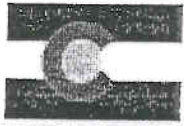
- Provide tests in segments so that child finishes one segment before receiving the next part.
- Highlight main ideas and supporting details in the book.

BEHAVIOR STRATEGIES

- Use behavioral management techniques.
- Implement behavioral/academic contracts.
- Utilize positive reinforcements (rewards).
- Utilize negative reinforcements (consequences).
- Confer with the child's parents (and child as appropriate).
- Confer with the child's other teachers.
- Establish a home/school communication system for behavior monitoring.
- Post rules and consequences for classroom behavior.
- Write a contract for child behavior.
- Offer social reinforcers (i.e., praise) for appropriate behavior.
- Establish daily/weekly progress report for the child.
- Implement self-recording of behaviors.

PRESENTATION STRATEGIES

- Tape lessons so the child can listen to them again.
- Provide photocopied material for extra practice (i.e., outlines, study guides).
- Require fewer drill and practice activities.
- Give both oral and visual instructions for assignments.
- Vary the method of lesson presentation:
 - a. lecture
 - b. small groups



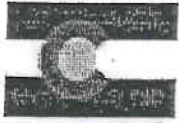
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100 EFFECTIVE ACCOMMODATIONS/SERVICES

Listed below are some of the more frequent recommendations that teachers have found to be effective for children with disabilities.

1. Provide study carrels.
2. Use room dividers.
3. Provide headsets to muffle noise.
4. Seat child away from doors/windows.
5. Seat near model (child or teacher).
6. Provide time-out area.
7. Rearrange child groups (according to instructional needs, role models, etc.).
8. Group for cooperative learning.
9. Vary working surface (e.g., floor or vertical surface such as blackboards).
10. Simplify/shorten directions.
11. Give both oral and written directions.
12. Have child repeat directions.
13. Have child repeat lesson objective.
14. Ask frequent questions.
15. Change question level.
16. Change response format (e.g., from verbal to physical; from saying to pointing).
17. Provide sequential directions (label as first, second, etc.).
18. Use manipulatives.
19. Alter objective criterion level.
20. Provide functional tasks (relate to child's environment).
21. Reduce number of items on a task.
22. Highlight relevant words/features.
23. Use rebus (picture) directions.
24. Provide guided practice.
25. Provide more practice trials.
26. Increase allocated time.
27. Use a strategy approach.
28. Change reinforcers.
29. Increase reinforcement frequency.
30. Delay reinforcement.
31. Increase wait time.

32. Use firm-up activities.
33. Use specific rather than general praise.
34. Have a peer tutor program.
35. Provide frequent review.
36. Have child summarize at end of lesson.
37. Use self-correcting materials.
38. Adapt test items for differing response modes.
39. Provide mnemonic devices.
40. Provide tangible reinforcers.
41. Use behavioral contracts.
42. Establish routines for handing work in, heading papers, etc.
43. Use timers to show allocated time.
44. Teach self-monitoring.
45. Provide visual cues (e.g., posters, desktop number lines, etc.).
46. Block out extraneous stimuli on written material.
47. Tape record directions.
48. Tape record child responses.
49. Use a study guide.
50. Provide critical vocabulary list for content material.
51. Provide essential fact list.
52. Use clock faces to show classroom routine times.
53. Use dotted lines to line up math problems or show margins.
54. Provide transition directions.
55. Assign only one task at a time.
56. Provide discussion questions before reading.
57. Use word markers to guide reading.
58. Alter sequence of presentation.
59. Enlarge or highlight key words on test items.
60. Provide daily and weekly assignment sheets.
61. Post daily/weekly schedule.
62. Use graph paper for place value or when adding/subtracting two digit numbers.
63. Provide anticipation cues.
64. Establish rules and review frequently.
65. Teach key direction words.
66. Use distributed practice.



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67. Provide pencil grips.
68. Tape paper to desk.
69. Shorten project assignment into daily tasks.
70. Segment directions.
71. Number (order) assignments to be completed.
72. Change far-point to near-point material for copying or review.
73. Put desk close to blackboard.
74. Incorporate currently popular themes/characters into assignments for motivation.
75. Repeat major points.
76. Use physical cues while speaking (e.g., 1, 2, 3, etc.).
77. Pause during speaking.
78. Use verbal cues (e.g., "Don't write this down", "This is important").
79. Change tone of voice, whisper, etc.
80. Use an honor system.
81. Collect notebooks weekly (periodically) to review child notes.
82. Reorganize tests to go from easy to hard.
83. Color code place value tasks.
84. Use self-teaching materials.
85. Do only odd/or even numbered items on a large task sheet.
86. Use extra spaces between lines of print.
87. Provide organizers (e.g., cartons/bins) for desk material.
88. Teach varied reading rates (e.g., scanning, skimming, etc.).
89. Provide content/lecture summaries.
90. Use peer-mediated strategies (e.g., "buddy system").
91. Call child's name before asking a question.
92. Use extra spaces between lines of print.
93. Color code materials/directions.
94. Use raised-line paper.
95. Provide calculators.
96. Circle math computation sign.
97. Use hand signals to cue behavior (e.g., attention, responding).
98. Establish a rationale for learning.
99. Use advance organizers.
100. Help children to develop their own learning strategies.

Date: February 9, 2007
Subject: "TOP TEN" LESSONS LEARNED IN DUE PROCESS;
By: Darryl L. Farrington (dfarrington@smmmpc.com)

Most of our due process cases in Colorado settle. Even when they do not settle, the outcomes are often so dependent upon the facts and opinions elicited at the hearing that the precedent value of a particular case may be limited. Therefore, our "lessons learned" are often not so much through establishment of legal precedent, but in the practical cause and effect equations we can see in retrospect as we think about the cases. In this session we will discuss the "Top Ten"¹ issues that can either "cause" a due process case to be filed, or make it much harder to defend once it is filed. We hope that this exercise can inspire us to develop ways of avoiding these problems in the future.

10. Flawed/dysfunctional intake process when a transfer student arrives.
Attorneys are detecting an increase in due process complaints and threats of due process that occur shortly after a family moves into the school district.

THE PROBLEM: The team cannot or does not implement the existing IEP that comes in with the student, *nor* does the team make a documented interim placement with clarification that these services are temporary until the end of the process, with a staffing scheduled within 30 days.

COMMENT: There are two choices: Either implement the existing IEP substantially as written or place the student in an interim placement with the parents' agreement, and create a new IEP at the end of that time. Whichever course is chosen, it needs to be carefully explained to the incoming parents and documented. Either way, services need to begin within 3 school days unless extended by written agreement with the parent. If parents will not agree to the interim placement and the team

¹ The format is based upon the "Top Ten" lists popularized on The Late Show with David Letterman, CBS, in which the listed items are ranked in reverse order from most ten-scales, "10" representing the lowest item in priority or significance on the list, and "1" representing the highest in priority or significance.

does not have the IEP from the previous school, the district needs to offer an interim placement in writing, including services based upon whatever information the school has been able to obtain from parents or other sources, but stressing that this is a temporary, interim offer until the IEP is obtained and reviewed by staff, or until a new IEP meeting is convened.

9. Ignoring statements in IEP meetings or correspondence that can be construed as "notice" that the parent intends to make a unilateral placement.

THE PROBLEM: When a parent files due process for reimbursement after a unilateral placement is made, team members acknowledge, or meeting notes reflect, that the parents said they were looking into private residential placement and reviewing a number of different schools at the last IEP meeting. Often, the notes indicate a statement by a staff person that private placement is the "parents' choice" and that the district will not be responsible for that placement, but the district has not taken any further action in response to the notice.

COMMENT: When giving notice of a unilateral placement, parents have two choices under 34 CFR 300.148(d). They can either notify us orally at the most recent IEP meeting prior to the removal from public school, or they can give written notice at least 10 business days prior to removal from public school. If the parents fail to provide notice in one of these two ways, reimbursement can be denied or limited. If they do give notice in one of these ways, it is the school's "last chance" to offer improvements to the program, or a further evaluation if that is needed, and thereby improve the LEA's defensive position if and when the removal and unilateral placement occurs. The classical response to the notice that the student will be removed for unilateral placement is along the following lines: "Neither observation of staff nor existing evaluation data supports removal of this child to [a residential setting] [setting in which he is segregated from typical peers]. Before the district can consider supporting such an option, we would have to have further evaluation. Accordingly, the district hereby offers to perform the following evaluations:" If the existing IEP at the time of the parents' notice is weak, the team can immediately work on ways to improve it and present those to the parents before the noticed removal date. The point is to have the best IEP possible to defend if there is a reimbursement case.

8. "Temporary" homebound placements.

THE PROBLEM: The issues include (i) failure to commence homebound services when they were promised, (ii) failure to have coordination between the homebound tutor and responsible school staff, (iii) leaving a student on homebound status longer than the parent anticipated based upon staff statements, (iv) failure to develop a homebound IEP or modify the existing

IEP to reflect the homebound services, and (v) failure to provide IEP services during homebound.

COMMENT: It is very common to have one of these issues present when a due process hearing is filed. Causes may include the following:

- a. Our homebound systems are often disconnected from special education and when a "referral" is made to homebound, the special ed staff tends to assume the homebound system is functioning correctly, when that confidence may be misplaced.
- b. There may be an "out of sight; out of mind" dynamic that causes teams to lose focus on a student who has been placed on homebound status.
- c. The behavior-related reasons that resulted in the homebound placement continue to interfere with service-delivery, which results in minimal services and minimal educational benefit.

In most cases, homebound is not the student's year-long placement, and he should not be allowed to languish on homebound when it is not used as an interim alternative setting, and is not necessary for medical or other reasons. FAPE is essential during homebound, and it is common to have claims based upon a failure to provide IEP services during homebound placements. Sadly, there is often poor documentation, including no IEP team meeting to develop and document the homebound program. Someone needs to follow through with the homebound people and to see that the team makes the necessary adjustments to the IEP or creates a temporary service plan, AND work to make sure the permanent placement is ready and implemented on schedule. When the homebound tutor reports an inability to serve the student due to behavioral issues directly and substantially related to the student's disability, we need to send someone with different skills or re-think homebound as an option.

7. Failing to seek and document "understandings" with the parent concerning departures from IEP due to staff shortages and absences.

THE PROBLEM: Staff thought parent had agreed to part-time para support until the hiring process was complete to get the full-time 1:1 para in place. A speech therapist is out on serious medical leave and no one is available to provide that service for weeks. It is not addressed with the parent, and parent files due process or a federal complaint.

COMMENT: In some cases, temporary alternative measures can be implemented that allow the student to receive meaningful benefit and therefore FAPE can be achieved without the promised service listed on

that is filed by certain attorneys. It can come up in at least three different ways.

- d. It can be related to ambiguity about draft IEPs.

COMMENT: Dick Lyons of Bernard, Lyons, Gaddis & Kahn, P.C., gives this suggestion: When you prepare a draft IEP, *intentionally* leave some areas to be filled in during the meeting. Also, make sure the document not only is marked "Draft" but also state and be sure the meeting notes reflect that the document is a draft for consideration by the team.

- e. Staff members sometimes make closed-end refusal statements based upon the staff member's experience or the district's traditional ways of doing things. It can be a statement made by a staff member in an individual contact with parents, or something said during an IEP meeting or staffing.

COMMENT: This can happen at any time, but it seems to be a particular problem when parents are first coming into a new district, or their child is first being referred for special education. They may inquire about a particular type of service that has been provided to their child in the past, or that they have heard or read about. If the staff member is unfamiliar with the service mentioned, or hasn't used it in their district, it is common for them to say something like, "we don't do it that way" or "we don't offer that." If that parent ends up being represented by one of our leading student advocacy lawyers, we will certainly hear about that conversation as part of the due process proceedings, and the very thing that "we don't offer" is sure to be felt crucial to the youngster's educational success. Any successful response includes a reference to the IEP team as the body responsible for determining an appropriate program, and anything the parent wants to bring to the meeting will be considered.

- f. It can relate to assumptions that a student will be served in a particular program, usually center-based, in the district prior to the staffing and development of the IEP.

COMMENT: This happens routinely. A student comes into the district with a diagnosis in the autism spectrum and an "autistic-like" appearance and array of behaviors, and staff starts talking to the parents immediately about the terrific center-based autism program at one of the elementary schools a few neighborhoods away from where the family lives. We